On the establishment of religion:
What the Constitution really says

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When he ordered the removal of the Ten Commandments monument from the Supreme Court building in Alabama, federal judge Myron Thompson stated that the issue at stake involved the question of whether or not the state has the right to acknowledge God.

Actually, this formulation is a distraction from the real issue, which is whether or not Myron Thompson or any other federal judge has the right to interfere with state actions that may or may not constitute an establishment of religion.

Someone who simply reads the text of the Constitution of the United States would be thoroughly surprised to learn that a federal judge claimed the right to act in this manner. The First Amendment to the Constitution plainly states: "Congress shall make no law respecting an establishment of religion . . ." *Since there can be no federal law on the subject, there appears to be no lawful basis for any element of the federal government—including the courts—to act in this area.*

Moreover, the 10th Amendment to the Constitution plainly states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *This means that the power to make laws respecting an establishment of religion, having been explicitly withheld from the United States, is reserved to the states or to the people.*

Taken together, therefore, the First and 10th Amendments reserve the power to address issues of religious establishment to the different states and their people.

An erroneous premise

Now, Judge Thompson—like many federal judges and justices before him—claims the unlimited prerogative of dictating to the states what they may or may not do with respect to matters of religious expression. Applying this supposed prerogative, he has declared the erection of the Ten Commandments monument by the chief justice of the Supreme Court of the state of Alabama to be an unlawful establishment of religion.

This he has done despite the clear impossibility of any basis for his action in federal law or statute. He relies on the erroneous doctrine, repeatedly affirmed by the Supreme Court of the United States, that the First Amendment forbids an establishment of religion, and that the 14th Amendment applies this prohibition to the states. Based on this assertion, he and other federal judges and justices now claim an unlimited right to dictate to the states in these matters.

We have already seen that the actual language of the Constitution does not forbid an establishment of religion. Rather, it forbids Congress to legislate on the subject at all, reserving it entirely to the states. No language in the 14th Amendment deals with this power of government.

Portions of that amendment do indeed restrict the legislative powers of the states, but they refer only to actions that affect the privileges, immunities, legal rights and equal legal status of *individual*

citizens and persons. The first clause of the First Amendment in no way deals with persons, however, but rather—in concert with the 10th Amendment—secures the right of the states and the people to be free from the dictates of federal law respecting an establishment of religion.

Distinguishing rights of the people from individual rights

A right of the people as a whole—not an individual right—is the protected object of the first clause of the First Amendment to the Constitution. Even if one accepts the doctrine that the Bill of Rights must be taken as the basis for understanding the privileges and immunities of citizenship, the first clause of the First Amendment simply secures this right of the people, giving clear constitutional effect to their immunity from federal dictation in matters of religion.

The practical foundation of all the rights and privileges of the individual citizen is the rights that inhere in the citizen body as a whole, the rights of the people and of the state governments. The latter effectively embody their ability to resist abuses of national power. Such rights include the right to elect representatives, and to be governed by laws made and enforced through them. (The right to vote is an individual right. The right to elect is a right of the people as a whole.) Without these corporate and collective rights, there would be no mechanisms for the concerted action of the people, no institutions for their united defense and, therefore, no materially effective security for their individual persons, property and rights against the organized forces of an abusive national power.

The establishment clause of the First Amendment secures a right of the people. Until now, though, many have treated the first two clauses of the amendment as if they are one ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."). This practice ignores both the linguistic and the logical contrast between the two clauses. Where the first clause deals with a right of the people (that is, a power of government reserved to the states and to the people), the second clause deals with an action or set of actions (the free exercise of religion) that cannot be free unless they originate in individual choice. The first clause forbids Congress to address a subject at all. The second allows for federal action, but restricts the character of such action.

By virtue of the first clause, the states and the people as such are protected from federal domination; by the second, individuals are protected from coercion in their religious conduct. The first clause allows the states and the people as such to follow their will in matters of religion; the second guarantees the same liberty to individuals and the corporate persons they voluntarily compose. The first has as its object matters that are decided by the will of the people (i.e., by the will of the constitutionally determined majority in the different states). The second involves matters decided by the will of each individual.

Parallel rights and actions

The failure to observe this distinction leads to the absurd presumption that all government action in matters of religion is somehow inherently a contravention of individual freedom. This can be no more or less true in matters of religion than it is in any other area in which both individuals and governments are capable of action and decision.

The government's power to arm soldiers for the community's defense does not inherently contravene the individual's right to arm himself against personal attack. The government's power to establish institutions of higher learning does not inherently contradict the individual's right to educate his young or join with others to start a school. The government's power to engage in economic enterprises (such as the postal service or electric power generation) does not inherently contradict the individual's right to private enterprise. It is possible for government coercively to inhibit or repress any of these individual activities, but it is obvious that government action does not in and of itself constitute such coercion.

As the U.S. Constitution is written, matters of religion fall into this category of parallel individual and governmental possibilities. Federal and state governments, in matters of religion, are forbidden to coerce or prohibit individual choice and action. Within the states, the people are free to decide by

constitutional majority the nature and extent of the state's expression of religious belief.

This leaves individuals free to make their own choices with respect to religion, but it also secures the right of the people of the states to live under a government that reflects their religious inclination. As in all matters subject to the decision of the people, the choice of the people is not the choice of all, but of the majority, as constitutionally determined, in conformity with the principles of republican government (which the U.S. Constitution requires the people of each state to respect).

Subverting the wisdom of the Founders

The Constitution reflects the view that the choice with respect to governmental expressions of religious belief must respect the will of the majority. Unless, in matters that should be determined by the people, the will of the majority be consulted, there is no consent and therefore no legitimacy, in government.

Though it may be argued that matters of religion ought to be left entirely to individuals for decision, this has the effect of establishing in the public realm a regime of indifference to religion. Thus, a choice of establishment is inevitable, and the only question is whether the choice will be made by the will of the people or not. The U.S. Constitution, being wholly republican, decides this question in favor of the people, but in light of the pluralism of religious opinions among the people, forbids any attempt to discern the will of the people in the nation as a whole.

By leaving the decision to the people in their states, and by permitting a complete freedom of movement and migration among the states, the U.S. Constitution offers scope for the geographic expression of this pluralism while assuring that the absence of a formal and legal expression of religious reverence on a national scale does not inadvertently result in the establishment of a national regime of indifference to religion.

When, by their careless and contradictory abuse of the 14th Amendment, the federal judges and justices arrogate to themselves the power which, by the First and 10th Amendments, the Constitution reserves to the states, they deprive the nation of this prudent and logically balanced approach to the issue of religious establishment.

Whether through carelessness or an artful effort to deceive, they ignore the distinction between the individual right to free exercise of religion and the right of the people to decide their government's religious stance. They have, in consequence, usurped this right of the people, substituting for the republican approach adopted by the Constitution an oligarchic approach that reserves to a handful of un-elected individuals the power to impose on the entire nation a uniform stance on religion at every level of government.

The right to decide the issue of establishment is a fundamental right of the people. It is also among the most likely to cause bitter and passionate dissension when the religious conscience of the people is violated or suppressed. That may explain why it is the very first right secured from federal violation in the Bill of Rights.

When they take this right from the people, the federal judges and justices depart from the republican form of government. They impose, in religious matters, an oligarchic regime upon the states. They therefore violate, in letter and spirit, Article IV, Section 4 of the U.S. Constitution. This section declares that "The United States shall guarantee to every State in this Union a republican form of government . . ."

Unlawful usurpation and lawful resistance

In addition to these abuses and violations of the U.S. Constitution, the purblind insistence by these judges and justices on treating religious freedom as a strictly individual right has produced the very consequence that the Constitution's more prudent approach seeks to avoid. They have insisted that government adopt a stance of strict agnosticism, which in effect drives from the public realm all things that smack of religious belief.

This establishes, in the literal sense, a uniform regime of atheism in government affairs. (In the literal sense, atheism simply means the absence of God, and this, in the public realm, is what the

federal judges and justices insist upon.) Since, however unjustifiably, they claim for their opinions the force of law, it necessarily follows that they mean to impose this regime by force—that is, by coercion. Thus, in the guise of a judicial effort to protect religious freedom, they destroy it—not for this or that individual, but for the people as a whole.

Naturally, this destruction has aroused anxiety and opposition among the people, who feel and fear the effects of this wholesale suppression of public religious conscience and belief. With each new manifestation of the nature and intent of the federal judiciary's usurpation of their right, the people grow more resistant. Their acts of resistance against this judicial despotism reach higher and more organized levels until they are undertaken in and through the institutions of the state governments.

The state governments are the natural focus and vehicle through which the people organize and declare their opposition to unconstitutional assertions of federal power. Because the federal judiciary cloaks its usurpation in the usual forms and procedures of law, and because Americans are accustomed to taking those forms as evidence of substantive conformity with the law, these manifestations of resistance may be denounced as unlawful.

But in this case, the lack of lawful grounds for the federal judiciary's acts must, in the end, repel these denunciations. The federal judges and justices cannot be acting lawfully when their only claim of lawfulness rests upon the Constitution—since the Constitution's sole pronouncement on the matter of an establishment of religion precludes the possibility of any federal law as a basis for their jurisdiction.

Some may insist that regardless of anyone's opinion of the lawfulness of a court's action, all are duty-bound, in the interest of order and law enforcement, to obey every court order. This is certainly true of ordinary citizens in most circumstances. Even where ordinary citizens are concerned, however, it is not hard to imagine situations in which they would be morally obliged to refuse a plainly unlawful court order. If, for instance, a judge issues an order requiring that at random an innocent person be shot when entering the courtroom, no person, including any officers of the court, is required to obey this order. In fact, like military personnel, they are duty-bound to refuse.

What is imaginable for ordinary citizens is even more conceivable when dealing with high government officials who are sworn to uphold the constitutions and laws that establish self-government in the states, and that protect the liberties of individuals and of the people. If a federal judge orders the governor of a state to take actions that he conscientiously believes violate the rights of an individual or group of individuals, no one would deny that he is duty-bound to refuse such an order.

If, for example, a Nazi regime somehow came to power at the federal level, and by legislation or executive order initiated an effort to confine Jewish or black Americans to concentration camps, all state officials acting under state constitutions that protected individual rights would be oath-bound to refuse unlawful federal court orders that declared people to be of Jewish or black heritage and thereupon ordered their confinement.

What we clearly acknowledge to be possible and even morally obligatory in case of the violation of individual rights must be even more compelling when the case involves the violation of the rights of the whole people. Thus, when a federal judge issues an unlawful order that a state official conscientiously believes violates a fundamental and constitutionally protected right of the people of his state, that official must refuse the order that assaults their right just as he would refuse an order that violated the rights of individuals. It is of no consequence whether the unlawful order comes from one judge or many, from a lower court or the Supreme Court—it must be refused.

Note that the wording here implies an obligation, not a choice. This is important—since it makes clear that the court's unlawful order places the state official in a situation where his substantive duty to the law conflicts with his formal obligation to obey a court order. A regime in which slavish observance of the empty forms of law substitutes

for substantive respect for the real terms and requirements of the law clearly represents the demise of law as such.

Judge Moore and the people of Alabama

In the state of Alabama, Judge Roy Moore has refused the unlawful order of Judge Myron Thompson, since it represents a destructive violation of the right of the people of Alabama to decide how their government will or will not express their religious beliefs. This right of the people is the first one secured in the U.S. Constitution's Bill of Rights, and it cannot be compromised without surrendering the moral foundations of republican liberty. Judge Thompson's assault upon this right, and that of the entire federal judiciary for the last several decades, is not, therefore, a trivial threat to the liberty of the people. Judge Moore cannot obey the court's order without surrendering that liberty.

Now, the 14th Amendment to the U.S. Constitution, as it applies the Bill of Rights to the states, lays an obligation upon state legislatures, officers and officials to refrain from actions that deprive the people of their rights. With respect to the First Amendment, therefore, it becomes their positive obligation to resist federal encroachments that take away the right of the people to decide how their state governments deal with matters of religion. This obviously has a direct bearing on the case of Chief Justice Roy Moore in his confrontation with the abusive order of Judge Myron Thompson.

His refusal of the order is not only consistent with his duty to the Alabama Constitution, it is his duty under the Constitution of the United States. Alabama Attorney General Bill Pryor, the eight associate justices of the Alabama Supreme Court, and indeed any other state officials in Alabama who submit to the judge's order are, by contrast, in violation of the federal Constitution, as well as their duty to the constitution and people of Alabama.

As a class, therefore, the citizens of Alabama are justified in bringing suit against them for their dereliction, and in seeking reparation for the damage that has been done to their right under the U.S. Constitution. Unfortunately, since the federal judiciary is the perpetrator of the assault against this right, how can the people of Alabama hope for a fair and unbiased judgment from any of the federal courts, including the Supreme Court?

Judicial self-interest

Lawyers will doubtless object on the grounds that the Supreme Court has repeatedly affirmed the jurisdiction of the federal courts in this regard. Their partisan reverence for the Supreme Court's opinions on this matter is wholly understandable, since a seat upon the court, or upon the bench of one of the inferior federal courts, usually represents the highest point toward which their ambition aspires. It is quite natural that they should support claims to a power that they may hope someday to wield.

However, lawyers' insistence that others show the same reverence is repugnant to reason and common sense. In the matter of their constitutional jurisdiction, as against the state courts or the other branches of the federal government, the federal courts—including the Supreme Court—have a strong and direct interest. If judgment in these matters is left to them absolutely, it must always lead to a situation in which the judges and justices sit in judgment of their own cause.

Our common sense joins the admonitions of the Founders of our republic in warning us not to rely on such intrinsically biased judgments. The prospect of expanding their power may distract the federal judges from the facts and merits of the case. This is, and ever has been, a weakness of our humanity.

The people and their representatives

This is why the U.S. Constitution, after enumerating certain cases over which the federal judiciary would have original jurisdiction, gave it appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." Therefore, the federal courts are not the ultimate judges of the boundaries of their own power. Final responsibility in this respect rests with the Congress.

Once we take note of this fact, it also becomes clear that thinking about matters of jurisdiction at the constitutional level cannot be considered the exclusive province of lawyers and judges. Though Congress has in some historical periods been composed of a plurality, or even a majority of lawyers, lawyers could never have an exclusionary claim to membership in its ranks. The people can send to Congress whom they choose, including people from walks of life in no way related to the legal profession. It follows, therefore, that the Constitution assumes that people who are not lawyers will have to reason and make judgments about the proper scope and limits to be imposed upon the appellate jurisdiction of the federal courts.

The fact that the Supreme Court affirms the federal judiciary's claim to jurisdiction over the state governments in matters pertaining to an establishment of religion does not, therefore, settle the issue. The Congress must review and oversee such a claim. Since the people choose the members of Congress, people at large, as they consider their election, are required to consider this claim as well.

Our analysis thus far demonstrates that the Supreme Court's affirmation of this claim of jurisdiction is contrary to the plain text of the Constitution: It usurps the right of the people in their respective states to decide their government's stance on religion; it violates Article IV, Section 4 of the Constitution by subverting the republican form of government with respect to this right; and by aiming coercively to establish an agnostic regime of atheism at all levels of government, it destroys religious freedom for the people as a whole and dangerously subverts the Constitution's prudent handling of matters pertaining to religion.

The right and duty of Congress

The text of the Constitution easily allows us to see and understand the federal judiciary's abuse of power and its usurpation of the right of the people in religious matters. It also provides a remedy for this abuse. *The Congress must pass legislation that, in order to assure proper respect for the first clause of the First Amendment, excepts from the appellate jurisdiction of the federal courts those matters which, by the conjoint effect of the First and 10th Amendments, the Constitution reserves to the states respectively and to the people.* (This language avoids a semantic difficulty, since congressional legislation that explicitly mentioned matters pertaining to an establishment of religion would serve the intention but violate the terms of the first clause of the First Amendment.)

This legislation would restore observance of the Constitution by preventing the federal courts from addressing any issues related to religious establishment (as the First Amendment requires), while leaving them free to deal with cases involving the free exercise of religion by individuals, since these do not fall under constitutional ban on federal legislation. In this regard, the only state actions that come under federal jurisdiction are those involving coercive interference with individual choice in matters of religion. State action that involves no such individual coercion (such as the placement of a Ten Commandments monument in the rotunda of a state Supreme Court building) is outside the purview of the federal courts.

The consequences of congressional failure to act urgently upon this matter are almost too grave for contemplation. State officials will be continually beset by federal court judgments that demand action the U.S. Constitution forbids. Errors of judgment by federal officials seeking to enforce such orders might lead to confrontations between federal officers determined to do what federal judges order and state officers determined to do what the U.S. Constitution requires.

On one side and the other, claims of lawful justification would contribute to intransigence. Problems like this, left for very long without solution, raise the sombre spectre of national dissolution. This, the Congress has the constitutional means and duty to avoid. They should move to do so without delay.

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